(24)

No. 1067 82

Supreme Court of the United States.

OCTOBER TERM, 1942.

HOWARD B. PARKER,
Petitioner,

v.

UNITED STATES OF AMERICA ET AL.,
Respondents.

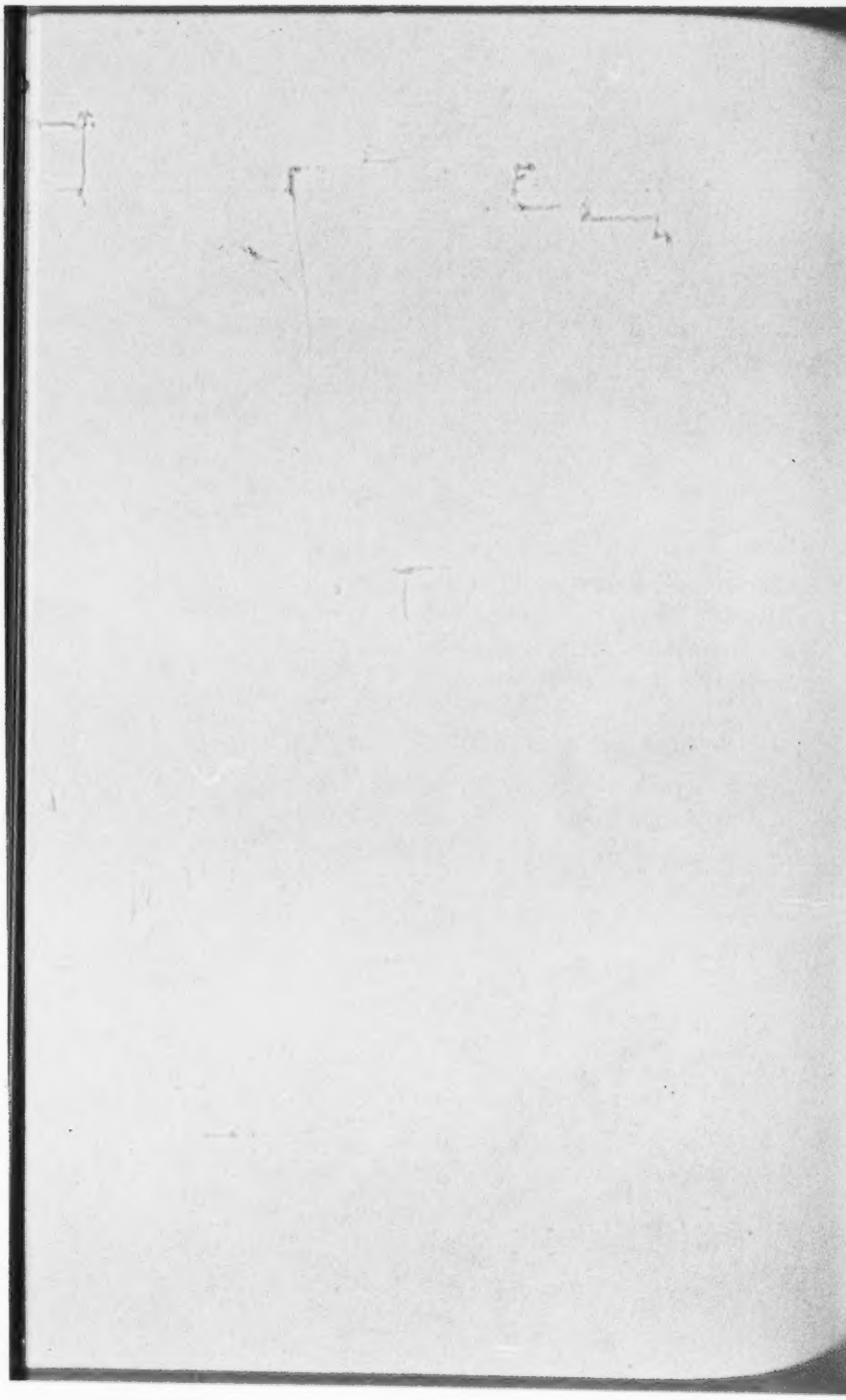
PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

RICHARD WAIT,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.



INDEX.

TABLE OF AUTHORITIES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1942.

HOWARD B. PARKER,
Petitioner,

v.

UNITED STATES OF AMERICA ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honourable the Justices of the Supreme Court of the United States, the undersigned on behalf of the above-named petitioner prays that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered April 13, 1943, in the case between the above-named parties, docketed therein as number 3790.

Opinions Below.

A memorandum opinion was filed in the District Court by Sweeney, J., and appears at page 250 of the record. The opinion of the Circuit Court of Appeals appears at pages 259 to 271 of the record.

An opinion of the Circuit Court of Appeals on an earlier appeal in the same case, referred to in the current opinion, is reported at 126 F. (2d) 370.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 13, 1943 (R. 271). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, U.S. Code, Title 28, Section 347.

The case to which the petition relates is a petition for attachment for contempt filed in a bill in equity prosecuted pursuant to the provisions of U.S. Code, Title 7, Section 608(a)(6). The bill in equity was brought to enforce compliance with Order No. 4, so called, issued by the Secretary of Agriculture, regulating the handling of milk in the Boston area. The petition for attachment for contempt was filed in said bill in equity against the petitioner after the entry of a final decree and sought relief against him of a civil nature upon the theory that he had violated the terms of the final decree.

Questions Presented.

(1) A corporation owes in excess of $40,000, and with interest in excess of $42,236.74, under a money decree. One of its officers causes it to sell its entire product over the period during which the obligation accrued at less than its fair value, the deficit being disputed but not exceeding $26,973.30. For the same period the excess of cost (including the $40,000 obligation) over income from sales is $42,236.74. On proceedings for contempt against the officer a compensatory fine is imposed upon him in the amount of $42,236.74. As a matter of law, can so much of the fine

as exceeds the deficit in fair value of the product sold be supported?

(2) Upon a bill in equity instituted against a corporation to enforce compliance by it to an administrative order an interlocutory decree is entered commanding the corporation and its officers to comply *pendente lite*. The corporation defends the suit in good faith. Compliance requires the making of periodic money payments. The operations of the corporation will not produce sufficient money to permit the making of the payments. Must the officers thereupon cause the corporation to cease operations before conclusion of the litigation upon pain of being subjected to a fine for contempt measured by the amount owed but not paid due to inability to obtain the necessary money from operations?

(3) In assessing a compensatory fine payable to the plaintiff upon a defendant to a petition for attachment for contempt of a court decree, can the wilfulness of the defendant's contumacious acts or his intent in committing them be taken into account to enhance the fine?

Statement.

Order No. 4 became effective August 1, 1937. At that time Green Valley Creamery, Inc., a Massachusetts corporation (hereinafter referred to as "Green Valley"), was a handler of milk within the definition of and subject to Order No. 4. It continued in business as a handler until March, 1940 (R. 17). Throughout that period the petitioner was the owner of all of the capital stock of Green Valley and directed and dominated its business (R. 22). That business consisted of the purchase of milk in Vermont, the running of a creamery at Passumpsic, Vermont, and the sale of the milk at Passumpsic to Stuart Milk Com-

pany, another Massachusetts corporation (hereinafter referred to as "Stuart").

Having purchased the milk at Passumpsic from Green Valley, Stuart then caused it to be brought to Boston and sold it within the Greater Boston Marketing Area, as defined in Order No. 4. This course of business by both corporations had been carried on prior to August 1, 1937, and continued unchanged until Green Valley went out of business (R. 29). Stuart still continues business in the Boston area. The petitioner was the owner at all material times of two-fifths of the capital stock of Stuart. He was the active executive of the company and dominated its business and policies (R. 22).

The bill in equity was commenced October 1, 1937. Green Valley was made the sole party defendant. The relief sought was compliance by Green Valley with the provisions of Order No. 4 primarily through the payment of moneys to the Milk Market Administrator pursuant to Articles VIII, IX, and X of Order No. 4 (R. 3695, 2-11).* An interlocutory decree directing compliance by Green Valley and its officers and payment of sums due under the order was entered by the District Court under date of November 30, 1937 (R. 2, 3). Under date of March 15, 1939, a final decree was entered containing similar commands (R. 3695, 15). This final decree was affirmed by the Circuit Court of Appeals on December 15, 1939.

Meanwhile Green Valley had made none of the payments required to be made by it under Order No. 4 and the two decrees (R. 21). Consequently the petition for attachment for contempt was filed December 19, 1939, immediately following the conclusion of the litigation in the

*The printed record in the earlier appeal, which bore the Circuit Court of Appeals number 3695, is incorporated by reference in the present record. References herein to this document are designated "R. 3695."

Circuit Court of Appeals (R. 3695, 16-21). This petition was one for civil contempt. It was filed in the suit in equity and named Green Valley (the sole defendant in that suit), the present petitioner, and his brother, who was a director of Green Valley and Stuart, as respondents. It alleged violation of the final decree only (no mention was made of the interlocutory decree) and prayed as relief commitment of the present petitioner to jail until Green Valley should obey the decree.

Green Valley wound up its business in the ensuing three months and ceased operations with no assets worthy of mention. It never had had sufficient cash or other assets with which to pay the Market Administrator and its operating expenses. When it ceased operations it owed the Market Administrator $41,722.37 (R. 18-21), of which $3,452.90 (R. 3695, 41) had accrued prior to the entry of the interlocutory decree. None of its assets had found their way into petitioner's pocket (R. 30). All moneys which it had received had been expended in normal operating expenses. Disregarding the obligations to the Market Administrator, its net loss was $6.31 for 1938 and $7,613.04 for 1939 (R. 94).

All money received by it had come from Stuart as payment for the milk delivered to it. The price thus paid and received was fixed by the petitioner as the responsible officer of each corporation (R. 150). The aggregate price paid by Stuart was $149,675.76. The fair market value *in Boston* of the milk for which this money was paid was $176,649.06 (R. 31). The milk was sold by Green Valley *at Passumpsic* and Stuart paid the cost of transporting it to Boston, which amounted to $26,577.87 (R. 101).*

*The foregoing figures represent the total shown in the master's report for the period from August 1, 1937, to December 31, 1939, and include both Class I and Class II milk. Adjustments can be made to eliminate everything referable from the period prior to the

On its side of the picture Stuart had operated at a small net loss throughout. In 1938 this loss had been $98.30; in 1939 $1,564.52. The petitioner had received a salary from Stuart, the amount of which did not appear, but total salaries paid by Stuart were $3,600 in 1938 and $4,400 in 1939 (R. 95). Likewise he was voted a bonus of $10,000 by Stuart on June 29, 1939, but this was not paid. Beyond this salary the petitioner received nothing from the operations of either corporation.

On the basis of these facts the District Judge in January, 1941, adjudged the petitioner to be in contempt and ordered him committed to jail until such time as Green Valley should pay what it owed to the Market Administrator (R. 3695, 49). Shortly thereafter and pending appeal Green Valley became a voluntary bankrupt. On appeal the Circuit Court of Appeals vacated this judgment. But the mandate directed that the District Court impose a remedial fine upon the petitioner for contempt, not only of the final decree, but also of the interlocutory decree as well (R. 267). At no time had the respondents asked any relief for violation of the interlocutory decree. That was brought into the case by the Circuit Court of Appeals of its own motion, without suggestion from either party, without argument addressed to the point, and upon a record built without reference to it by either side.

The mandate directed that the fine be measured by—

> "the extent that Parker's contumacious acts have had the intended effect of causing loss to the market administrator by depriving him irretrievably of the

---

temporary injunction and to eliminate Class II milk. These adjustments would vary the ultimate result by not more than $5,000 and there is dispute as to how they should be made. The principle involved is not affected, so the above figures are given without adjustment as fairly representative of the principle for present purposes.

fruits of the decrees against Green Valley'' (R. 266, 267).

On remand the respondents asked the District Court to impose a fine of $42,236.74, which represented the deficit from the operations of Green Valley after the interlocatory decree, including the debt to the Market Administrator, but after allowance of a small credit which is presently immaterial. The petitioner contended that the measure was the deficit in fair value of the milk sold which Green Valley did not receive as a consequence of the prices which he had fixed. This would have resulted in a very much smaller fine. The District Judge in his memorandum of decision said:

> ''To accept such a basis for the levy of a remedial fine would not do justice to the cunning and persistence of Parker . . . The result of his conduct has meant a loss to the market administrator of $42,236.74. This is the fair measure of his cupidity'' (R. 250).

The petitioner appealed. The Circuit Court of Appeals affirmed the order. The petitioner now seeks relief in this Court.

At no stage of the proceedings has any claim for relief by way of criminal contempt been advanced by the respondents. The case is one solely of civil contempt.

Specification of Errors.

The Circuit Court of Appeals erred—

(1) In imposing as a compensatory fine one measured in large part by punitive considerations.

(2) In imposing a fine greater than the amount of recovery lost to the Market Administrator through the

contumacious act of the petitioner in fixing prices beneath fair value.

(3) In construing the command of the interlocutory decree to require the petitioner to stop the business of Green Valley Creamery Inc., if that business could not produce sufficient moneys to enable payment of sums ordered paid by that decree.

(4) In imposing a fine in excess of the amount which the petitioner prevented Green Valley Creamery Inc. from receiving in return for its product which but for his contumacious acts would have been available for discharge of its obligations to the Market Administrator.

(5) In affirming the order of the District Court imposing upon the petitioner a fine in the sum of $42,236.74.

Reasons for Granting the Writ.

(1) The case presents an important point in federal law and practice. The structure of many of the recent statutes establishing administrative agencies to regulate the economic life of the nation involves the contempt power of the federal courts sitting in equity as the sanction for their ultimate enforcement. The provisions of the Agricultural Adjustment Act under which this case has been prosecuted are representative of the current social legislation generally. The proper measure of compensatory fines imposed in the application of that sanction is a matter of important public concern. The proper construction of interlocutory injunctions commanding compliance *pendente lite* and the question of whether they are to be so construed and enforced as to conclude the litigation in their practical effect is of particular importance. The interests of large numbers of persons operating small corporations with a narrow margin of profit will be served by an opinion of the Court upon this point. Uniformity of practice through-

out the country in the administration of judicial decrees for enforcement of social legislation is highly desirable. It can be achieved only through decisions of this Court and the present case presents a proper record for such a decision.

(2) The boundaries between civil and criminal contempt have been vague in the past and failure to observe them has caused confusion and injustice. Those boundaries and the consequent legal distinctions were settled by this Court in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418. In the present case both the District Court and the Circuit Court of Appeals applied the criteria properly applicable only in criminal contempt to a case of civil contempt. The supposed purpose and intent of the petitioner in committing the acts found to be contumacious was made the ground for imposing a fine of the size the petitioner has been ordered to pay. There is no authority justifying this and it is contrary to established law in cases of civil contempt as set forth in the opinions of this Court, notably in the *Gompers* case. The decision of the Circuit Court of Appeals in this respect conflicts with that of the court for the Fifth Circuit in *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. (2d) 725. Unless this Court reasserts the reasoning of its earlier decisions and resolves the conflict between the Circuits, confusion is sure to follow the opinion of the Circuit Court of Appeals. This Court has recently clarified the law with reference to criminal contempt. Similar clarification of the law with reference to civil contempt will serve a genuine public purpose.

(3) An injustice has been done to the petitioner, and if the writ is refused a precedent will be established for conduct by the United States as a litigant which will result in further injustices and will do injury to the public respect for the administration of justice. The record before the master consisted almost entirely of complicated computa-

tions and formal documents. These were sufficient to show the pricing policy of the corporation, its adverse effect upon the respondents, and the petitioner's responsibility for the policy. The evidence did not show more. In his report the master's findings of material facts are interlarded with repeated statements derogatory of the petitioner's motives in doing the acts found—none of which acts were disputed. These statements were immaterial as matter of law and without foundation in the evidence. The District Court confirmed the report and entered an order of commitment wholly without precedent. This order was reversed by the Circuit Court of Appeals on the first appeal, but in its opinion that court laid great emphasis upon the supposed intent and purpose of the petitioner based upon the derogatory statements in the master's report and directed the imposition of a remedial fine in lieu of the commitment. No request had been made by the respondents for such relief and the point had not been argued. Further, the Circuit Court of its own motion directed that violation of the interlocutory decree be declared. That decree was not mentioned in the petition for attachment and no argument had been had with reference to it. On remand the District Court rejected the petitioner's contentions as to the size of the fine upon the ground that petitioner's behaviour had been so reprehensible that justice required the larger fine. On the second appeal the Circuit Court affirmed upon the same ground and emphasized the *purpose* which it concluded had moved the petitioner to do what he did as a proper item to be taken into account in fixing the fine. Neither master, District Court, nor Circuit Court of Appeals found any diversion of assets to the petitioner or personal profit at the expense of the respondents. The amount which the petitioner prevented his company from receiving and so made unavailable to the respondents could not on any theory exceed $26,973.30.

He is now faced with a liability of $42,236.74 in the form of a *remedial* fine because the court concluded (without adequate evidence) that he had been an evil man. This manifestly unjust result has been accomplished by repeated departures from the orderly judicial procedure which this Court is sedulous to maintain in the lower federal courts.

Wherefore it is respectfully submitted that the petition should be granted.

RICHARD WAIT,
Attorney for Petitioner.

Dated, Boston, Massachusetts,
May 28, 1943.

Supreme Court of the United States.

OCTOBER TERM, 1942.

HOWARD B. PARKER,
Petitioner,
v.
UNITED STATES OF AMERICA ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts upon which the petition is based appear in the Statement in the petition and need not be restated here, although they will be somewhat amplified in the course of this brief. While it is recognized that this Court will not determine the question of whether it will grant the writ solely on the basis that the decision of the Circuit Court of Appeals was wrong, nevertheless we feel it necessary at the outset of this brief to show in outline form the error committed by the lower court before discussing the public aspects of the case, which we submit should move this Court to grant the petition.

The Decision of the Circuit Court of Appeals was Wrong.

It is firmly established that any relief granted in civil contempt proceedings must be remedial only and in no

sense punitive. Although a fine can be imposed, it is made payable to the use of the plaintiff and is not essentially different from execution issued on a money decree.

Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418.
In re Nevitt, 117 Fed. 448 (C.C.A. 8).
Nat'l Popsicle Corp. v. *Kroll*, 104 F. (2d) 259 (C.C.A. 2).

Where the decree in question is a money decree, as it was here, and where it does not command the contemnor himself to pay the money, but he is brought before the court upon the ground that he has prevented the party liable under the decree from making payment in conformity to it, a necessary corollary to this rule is that a compensatory fine cannot exceed the amount of prevention which the contemnor has accomplished. For example, if a corporation is ordered to pay $1,000 and has as its only assets $100 and one of its officers causes it to dissipate this $100, so that the plaintiff cannot obtain it in partial satisfaction of the decree, this would constitute an act of contempt for which a fine could be imposed upon the officer, but the fine could not exceed $100, the amount which the officer prevented the plaintiff from getting. There could be no warrant for imposing a fine of $1,000. That, in effect, is what the Circuit Court of Appeals has done in the present case.

The respondents' complaint against the petitioner is that he so managed Green Valley that it was without assets to respond to the money decree. Everything which he did necessarily centered around the price which he fixed for Green Valley to receive for its milk. The respondents claim that he fixed it at less than he should have to their detriment. In effect they placed as the amount that he should have caused it to receive a sum sufficient to pay the debt due to them plus the other expenses of the corpora-

tion. They give no account whatsoever to the fact that the business would not produce any such amount. The petitioner on the other hand has maintained the position throughout that the ceiling of the fine was the amount which he could have obtained for Green Valley and that in practice that necessarily meant the fair market value of the product sold for which he fixed the price. Our submission is that he could not be expected to extract blood from a stone and obtain a price which the market would not pay.

The fine imposed exceeded the fair market value by at least $15,000. Our contention is that it exceeded it by far more than that sum and we are prepared to demonstrate it by computations, but an excess of $15,000 is sufficient for purposes of the present brief.

The Circuit Court of Appeals dismissed this contention on the ground that whereas it might apply in some situations it would not where business was carried on with the specific intention of making sure that Green Valley never would have any assets with which to respond. In other words, the result of the decision is to say that the petitioner must have caused Green Valley to receive sufficient money to pay its debt, whether it was obtainable from the business or not. This, we submit, was clearly wrong.

An Important Federal Question is Presented.

The District Court had jurisdiction of the bill in equity only by reason of the provisions of U.S. Code, Title 7, Section 608(a)(6), which reads:

> "(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to

this chapter, in any proceeding now pending or hereafter brought in said courts."

This provision of the Agricultural Adjustment Act is fairly representative of the sanction provisions to be found in much of the current social legislation. These statutes which represent such an extremely important new departure in governmental control of the economy of the nation fall back for their ultimate sanction of enforcement upon the contempt powers of the federal courts sitting in equity.

The process of enforcing administrative directives by court decree developed to a considerable extent under the Federal Trade Commission Act, U.S. Code, Title 15, Sections 41 *et seq.* See *Federal Trade Commission* v. *Fairy Foot Products Company*, 94 F. (2d) 844 (C.C.A. 7). The more recent statutes have been more specific in their direction to the courts to use the equitable process to enforce the administrative determinations. Thus, by U.S. Code, Title 15, Section 77t(b), the Securities and Exchange Commission is authorized to enjoin violations of the Securities Act of 1933; by Section 77u(e) it may enjoin violations of the Securities Exchange Act of 1934; by Section 79r(f) it may enjoin violations of the Public Utility Holding Company Act of 1935; and by Sections 80a-35 and 41 it may enjoin violations of the Investment Company Act of 1940. So also the National Labor Relations Board is authorized to institute similar proceedings under Title 29, Section 160(e), although in that case the jurisdiction is confided to the Circuit Courts of Appeals. The administrator of the Wages and Hours Division of the Department of Labor is given similar entry to the District Courts by Title 29, Section 217. The Federal Power Commission is given a similar right under the Federal Power Act, Title 16, Section 825m, and the Federal Communications Commission has similar rights under the Communications Act of 1934, Title

47, Section 401(b), although in this instance money decrees are not authorized. (All of the above citations are to titles of the U.S. Code.)

The consequence of these provisions is that a great body of individuals who normally would never find their ways into a court of equity are now subject to its jurisdiction and must arrange their daily affairs with an eye upon the contempt power of the federal courts. In the administration of this power the proper use of the interlocutory injunction occupies a place of paramount importance.

The traditional purpose of the interlocutory injunction in equity is to preserve the status quo pending the litigation and to prevent irreparable injury to the plaintiff. Although a useful and necessary instrument of equity jurisdiction, it is a dangerous one. In practical effect an improvident temporary injunction results in a practical determination of the litigation against the defendant in advance of a trial.

This danger is specifically recognized by important federal statutes, and safeguards are set up against it. Thus interlocutory injunctions are immediately appealable pursuant to U.S. Code, Title 28, Section 227. More significant still are the statutory provisions dealing with injunctions in labor disputes. In this important field Congress has wisely enacted provisions restricting the use of temporary injunctions to a minimum. See U.S. Code, Title 29, Sections 101 *et seq.*

Interlocutory injunctions commanding compliance with regulatory administrative orders present a close parallel to similar injunctions in labor disputes. Both apply to economic relationships which are by and large foreign to the traditional jurisdiction of equity. The interests of the defendants in each are subject to greater harm from the operation of an interlocutory injunction than are the interests of the ordinary defendant in the ordinary bill in equity.

Consequently the proper construction to be placed on interlocutory injunctions of this sort and the fashion in which the courts should apply the contempt power to implement their commands present questions of true public concern which merit the attention of this Court.

The fine which has been imposed upon the petitioner is referable primarily to the interlocutory injunction of November 30, 1937. The "losses" which were adopted as the measure of the fine accrued in their major part prior to the entry of the final decree. Moreover, the final decree by its specific language commanded no payments accruing subsequent to January 15, 1939 (R. 3695, p. 16). Consequently, unless the interlocutory decree can be construed as commanding the petitioner to extract funds from the operations of Green Valley sufficient to pay accruals to the Market Administrator irrespective of economic possibility, there can be no possible warrant for the size of the fine, even upon the erroneous theory adopted by the lower court. The wording of the interlocutory decree was such as might have been taken from any form book. Certainly it did not specifically command the petitioner to obtain sums in the market which the market would not pay. If such a construction is to be placed upon its language, the interests of the public require that it should be placed upon it by this Court rather than by the Circuit Court of Appeals.

The pertinent provision in the decree was in paragraphs 3 and 4, which read:

> "3. That the defendant is hereby commanded and directed hereafter to pay to the market administrator all amounts which may hereafter become due and owing under the provisions of Order No. 4 as amended, during the pendency of this suit, the said payments to be made in the manner and at the times prescribed by said Order No. 4 as amended.

> "4. That the defendant, its agents, officers, employees, successors and assigns be and they hereby are commanded and directed to comply with all of the provisions of said Order No. 4 as amended during the pendency of this suit or until further order of this court." (Rec. 2, 3.)

It is submitted that this language is not susceptible to construction as a command to the petitioner to accomplish the impossible. Yet the Circuit Court of Appeals has so construed it. Traditionally courts of equity have refused to enter injunctions which cannot be obeyed. There is nothing here to suggest that on November 30, 1937, the District Court was departing from this cardinal principle of equity practice.

Moreover, it is significant that the respondents never suggested any such construction until it was placed in their mouths by the Circuit Court of Appeals; and the District Court itself did not construe it that way. Three weeks after the injunction was issued the respondents filed a petition for attachment. They did not make the petitioner a party (R. 3, 4), and they sought and received no such relief as has now been granted against the petitioner. The simple fine of $1,000 was imposed upon Green Valley (R. 8). A month later a similar petition was filed (R. 8-12). This time the petitioner was made a party, but no relief was granted against him and again Green Valley was fined $1,000 (R. 16). Except for this one petition on which no relief was obtained against the petitioner, the respondents never took any proceedings against the petitioner until after the Circuit Court of Appeals had affirmed the final decree. Obviously the Government did not construe the temporary injunction in the fashion in which the Circuit Court of Appeals has done.

The point is not that there could be any warrant for the petitioner in failing to obey a command imposed upon him by a decree; the question is whether what he has done constitutes disobedience to the command which was imposed. A strict construction is traditionally adopted on proceedings for contempt.

Terminal Railway Association v. *United States*, 266 U.S. 17, 29.

Berry v. *Midtown Service Corp.*, 104 F. (2d) 107 (C.C.A. 2).

American Trust Company v. *Wallis*, 126 Fed. 464, 466 (C.C.A. 3).

In re Sixth & Wisconsin Tower, 108 F. (2d) 538 (C.C.A. 7).

We submit that this question merits determination by this Court.

The Lower Courts have Confused the Important Distinctions between Civil and Criminal Contempt.

In contempt cases it often is difficult to ascertain at the outset whether the proceeding is in criminal or in civil contempt. It has been, however, firmly established in the federal courts that the distinction between the two is important and must be observed. Confusion on the point was set at rest by the decision of this Court in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418. Where the contempt is civil, and a fine payable to the plaintiff can be imposed only on civil contempt, it is established that the relief must be remedial only and in no sense punitive. This is established by the *Gompers* case. In the present case there never has been a suggestion that the proceeding was one for criminal contempt. It has been conceded throughout that it is civil.

Yet it is perfectly apparent that punitive considerations appropriate only to criminal contempt were paramount in the fixing of the amount of the fine. The district judge made this particularly clear through his reference to "the cunning and persistence" of the petitioner and to his "cupidity." If there were any doubt, it would be set at rest by the statement at the end of his memorandum:

> "To assess a remedial fine against him in any amount less than that figure would be to put a premium on his misconduct." (R. 250.)

The opinion of the Circuit Court of Appeals quotes from and sets forth the numerous derogatory statements contained in the master's report and ties the conclusion of the court to punitive considerations through the statement following the quotation from the earlier opinion:

> "*We had in mind the purpose* for which Green Valley Inc. was maintained and operated by Parker as above stated." (Italics supplied.) (R. 267.)

The same thought is apparent from the further statement:

> "Parker's course of conduct had the *intended* effect." (R. 268.)

And finally from the language used in dismissing the petitioner's argument as to the proper measure of the fine where it was stated:

> "Perhaps this argument would be valid as applied to a corporation operating a business in a bona fide manner. Such was not the case here." (R. 270.)

In imposing punishment upon the petitioner through the guise of a remedial fine, the Circuit Court of Appeals has

failed to apply the law clearly laid down by this Court in the *Gompers* case and has created a diversity among the Circuits. The question of the intent of the contemnor, which necessarily is material in a criminal contempt proceeding, was considered by the Fifth Circuit in *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. (2d) 725. The court there said, at page 727:

> "It goes without saying that petitioner is right that the question of intent with which the claimed acts were done is not material, unless the acts are equivocal and resort to the intent with which they are done is necessary to make their meaning clear."

This cannot be reconciled with the inquiry made by the Circuit Court of Appeals for the First Circuit into the petitioner's intent in the present case. This conflict should be resolved by this Court.

This Court has recently considered the questions of criminal contempt in its opinion in *Nye* v. *United States*, 313 U.S. 33. A similar consideration of civil contempt in the present case would serve a useful public purpose.

There have been Such Departures from Ordinary Procedure as to Merit Revision by This Court.

From what has gone before it is apparent, we submit, that the fine was wrongly computed and that an injustice will be done to the petitioner if it is permitted to stand. The fashion in which this danger of injustice has been brought about is such that it should be corrected by this Court. The situation is not one where a simple error of law has been committed which does not constitute adequate ground for issuance of a writ of certiorari.

The Circuit Court of Appeals brushed aside the petitioner's contention with reference to the facts in a footnote. This, we submit, was indicative of the fashion in which the case had been handled throughout and of the difficulties with which the petitioner has been faced. The particular contention of the petitioner was that the effective prevention by the petitioner, if any, was of a very much smaller amount than that stated by the master and that this was apparent on the face of the report. The footnote in question appears at pages 269 and 270 of the record.

In considering the question of whether the petitioner caused Green Valley to receive all that it should under market conditions in return for its milk, it must be borne in mind that the value, or the amount which should be received, depended ultimately upon the use to which the milk was put, and consequently upon the classification between Class I and Class II milk. Theories of classification necessarily differ and consequently the precise amount which Green Valley should have received could not be determined until after painstaking audit and correct determination of the classification. There must, therefore, have been a certain tolerance in determining whether the prices which were fixed by the petitioner were proper prices or not. There was no dispute as to the amounts in fact paid.

The value of the Class I milk involved for the period from August 1, 1937, through December 31, 1939, was put forward by the Government in Exhibit 15 (R. 89, 90). That value was $154,639.02. This was arrived at by taking the figure fixed by the order for Class I milk and subtracting from it the stated allowance for freight to the Boston area which is the fashion specified by the order. Since Stuart paid the cost of transportation after the payment to Green Valley, this was the proper figure to compare with the amount paid to determine whether the latter

amount was sufficient or not. When it came, however, to the determination of the market value and the consequent deficit in that value to be found, the Government did not proceed upon these figures which it had supplied, but instead induced the master to make his finding upon an entirely different set of figures. The argument by Government counsel, which the master followed, appears at pages 242 through 244 of the record.

This argument was based upon a completely different set of tables and on the theory that the criterion of value should be what Stuart in fact paid to vendors other than Green Valley. If all other vendors had been considered and proper allowance made for the cost of transportation, this would have been a fair enough method, but the Government was very careful to exclude the outside purchases which would hurt its theory and to make no mention of the cost of transportation. To this end it prepared and submitted Exhibit 28 (R. 110-113) and the master adopted this exhibit as the basis for his finding of a fair market value of $179,649.06. A breakdown of the figures showing the outside purchases for the years 1938 and 1939 shows the unfair method of selection adopted by the Government in this particular. Stuart purchased from vendors other than Green Valley 491,886 pounds of milk at a total cost of $13,586.24. This would make an average price of $2.742 per hundredweight. This is the price which should have been taken as the basis for market value on the theory professed to be accepted by the master. He said:

> "prices actually paid by Stuart Milk Company for Class I milk purchased from others than Green Valley Creamery, Inc., would appear to be determinative of the fair market value of the products so purchased, and I adopt and accept those prices." (R. 31.)

Applying this hundredweight value to the milk purchased in the two years would show that Green Valley actually received from Stuart $14,647.07 more than the fair value. But the figures put forward by the Government and in fact taken by the master related to only 50.98% of the total outside purchases. These selected purchases amounted to only 250,770 pounds for which Stuart paid $8,152.72, or an average of $3.251 per hundredweight. Applying this value to the milk purchased from Green Valley showed a deficit in market value for the period of $9,596.11.

Furthermore, the transportation cost cannot be neglected. The master did not in fact include it and did not in any way purport to do so. Yet the Circuit Court of Appeals concluded that he must have taken it into account, "otherwise, the master's finding would be meaningless" (R. 270). On this particular point the master's finding was worse than meaningless; it was a gullible adoption of misleading figures put forward in such fashion that the intention to mislead cannot be doubted.

If the misleading base for determining market value arrived at by careful selection of outside purchases is adopted and the transportation cost is thrown back, the deficit in market value over the total period is less than $1,000, which represents a pretty close approximation at an *ex post facto* finding of value. Moreover, there was likewise a dispute between the parties as to the proper classification of a considerable quantity of milk because of which, if the petitioner had been right, the value of the Class I milk which it is said he did not get for Green Valley would have been decreased by nearly $9,000 (R. 20).

The refusal of the Circuit Court of Appeals to consider these points (which are typical of others which cannot be compressed into the compass of this brief) represents a definite departure from the orderly course of judicial proceedings. With it should be taken into account the fashion

in which the question of fine was brought into the litigation by that court on its own motion without the matter having been argued by either party or suggested even by the Government. The earlier opinion indicated a definite desire on the part of the Circuit Court of Appeals to force the petitioner as far as possible himself to pay the obligation of Green Valley, which the court itself recognized he is not legally liable for. It adopted a method of doing it which had not been argued and which it is submitted had not been thought through by the court. When the point was argued on the second appeal and the court was put in a position to think it through, it refused to consider it. This is the sort of departure from orderly procedure which justifies review by this Court.

Respectfully submitted,

RICHARD WAIT.

(30)

No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1943

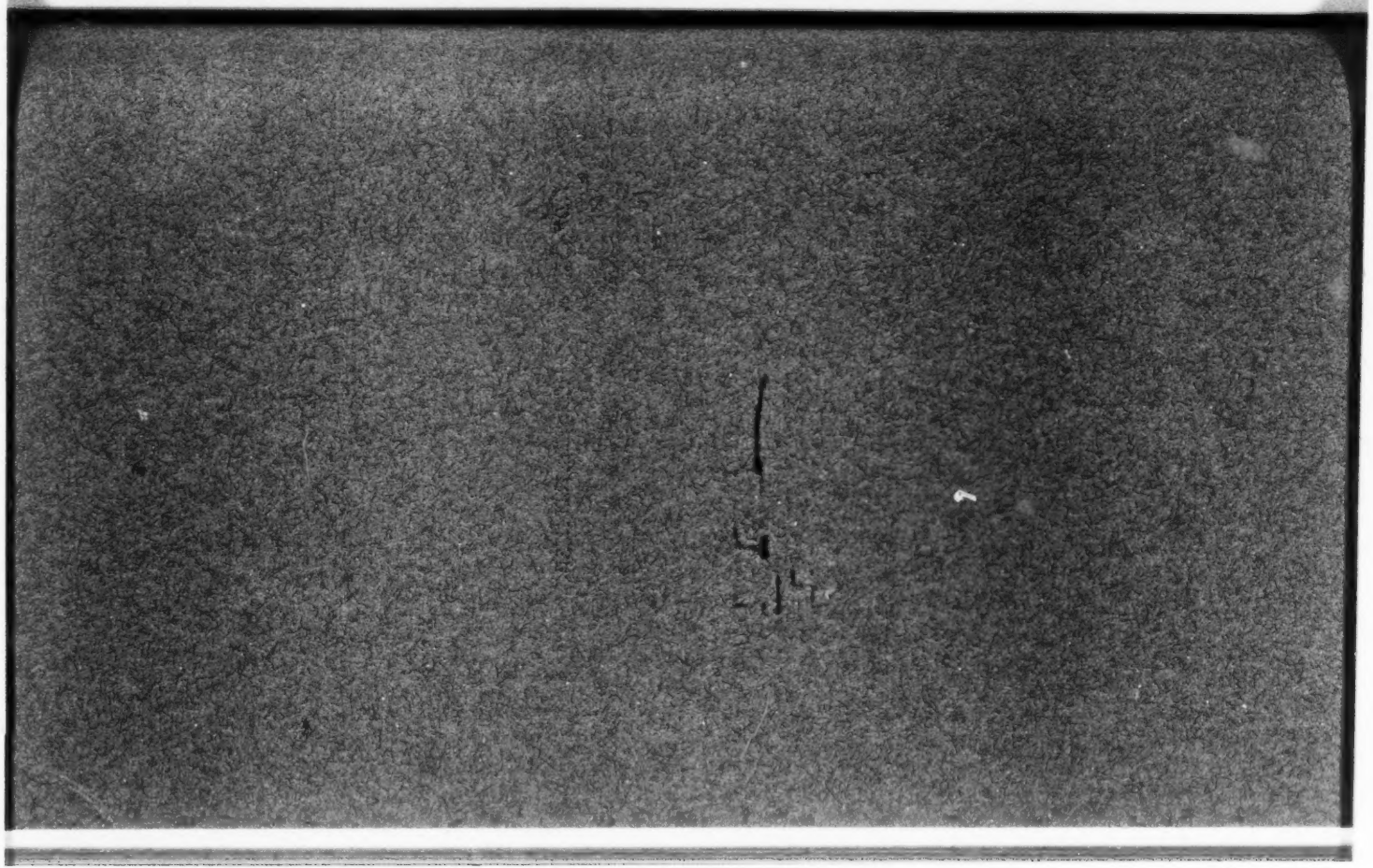
HOWARD B. PARKER, PETITIONER

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 82

HOWARD B. PARKER, PETITIONER

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 259–269[1]) is reported in 135 F. 2d 54. The memorandum opinion of the District Court appears at R. 250. The opinion of the Circuit Court of Appeals on an earlier appeal in this case is

[1] The record in this case incorporates by reference the printed record in an earlier appeal to the Circuit Court of Appeals, so that it consists of two separate parts. The record on the earlier appeal bore the number 3695 in the Circuit Court. Consequently petitioner has designated his references to that part of the record as "R. 3695." We shall do likewise, and shall designate references to the other part of the record as "R."

reported in 126 F. 2d 370. The memorandum opinion of the District Court on the earlier hearing appears at R. 3695, 49–52.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1943 (R. 269). The petition for a writ of certiorari was filed on June 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner has wilfully prevented a corporation dominated by him from obeying, and from being able to obey, judicial decrees directing payment of sums due the Administrator of a milk marketing order. The device employed was for that corporation to sell its milk to another corporation, also controlled by petitioner, at prices which covered all other costs but deliberately disregarded the amount due the Administrator, and to pay all other items of expense so as to leave the corporation without funds to pay the Administrator. The question is whether the court below could fix the proper measure of a compensatory fine for contempt of court at the difference between the total cost to the selling corporation (including the amounts due the Administrator) and the lesser amounts received by it, a sum

less than the amount due the Administrator, or whether the fine could be no greater than the difference between the amounts received and the fair market value of the milk.

STATUTE INVOLVED

This case does not involve the construction of any statutory provision. The Milk Marketing Order concerned was issued under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 608c, the validity of which was sustained in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588.

STATEMENT

Petitioner is the treasurer, general manager, and director of the Stuart Milk Company (R. 22), a corporation engaged in the business of selling milk to consumers in the Greater Boston Marketing Area (R. 17). He owns two-fifths of its capital stock and dominates its operations; his father owns the remainder of the stock (R. 22). He also held the same official positions and owned all of the capital stock in Green Valley Creamery, Inc. (R. 21–22), a Massachusetts corporation which was engaged in business as a handler of milk in that Area during the period from October 1934, to March 1940 (R. 16–17).

On October 1, 1937, the United States and the Secretary of Agriculture filed a bill in equity in the District Court seeking a mandatory injunc-

tion requiring Green Valley to comply with the provisions of Order No. 4, as amended, issued under the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 608c *et seq.*), regulating the handling of milk in the Boston Area (R. 3695, 2–11).[2] A temporary injunction was granted on November 30, 1937, directing Green Valley to pay to the Market Administrator all sums due then or thereafter under the Order, and ordering Green Valley and its officers to comply with all provisions of the Order, during the pendency of the suit (R. 2–3).

On March 15, 1939, the District Court issued a final decree ordering Green Valley to pay the amounts due under the Order and directing Green Valley and its officers to comply with all of the provisions of the Order (R. 3695, 15–16). This decree was affirmed by the Circuit Court of Appeals on December 15, 1939. *Green Valley Creamery* v. *United States,* 108 F. 2d 342. None of the amounts due the Administrator were ever paid. A petition for attachment for contempt was filed by the United States on December 19, 1939, against Green Valley, petitioner, and Otis H. Parker (petitioner's brother) for disobedience of the final decree (R. 3695, 16–21). The petition was referred to a master. His findings,

[2] The validity of both the Act and the Order was sustained by this Court in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588.

which are not challenged by petitioner, may be briefly summarized as follows:

Green Valley performed only the function of buying milk from producers and selling it to Stuart (R. 20).[3] All of the milk purchased by Green Valley was resold to Stuart at prices dictated by petitioner, who dominated the operations of both corporations (R. 20–21). These prices were fixed at levels substantially sufficient to cover all the costs of Green Valley apart from the sums owed by Green Valley to the Market Administrator (R. 22). At petitioner's direction, the bills from the Market Administrator were not carried as accounts payable by Green Valley, and its operating accounts were balanced without including therein such bills (R. 24). As a result Green Valley continually operated at a loss; Stuart purchased the entire product of Green Valley during the period from August 1, 1937 (the effective date of the Order), to December 31, 1939, at $47,072.65 less than the total cost of the products to Green Valley, if the sums due the Market Administrator are included in the cost (R. 28, 24).[4]

[3] Before the issuance of the first milk license for the Boston area, the Stuart Company purchased its milk directly from producers; this method of doing business would have obligated it to make payments to the equalization fund under the Order. In 1934, after the promulgation of the first predecessor to the Order, Green Valley was organized, and it undertook to purchase the milk from the producers and to resell it to Stuart (R. 139–140, 261–262).

[4] The computation by which this result was reached appears at R. 3695, pp. 41–42. The Master included in the cost the

By this conduct petitioner disabled Green Valley from paying the amounts due the Administrator and from complying with either the temporary or the final decree (R. 27, 23). On December 31, 1939, Green Valley was insolvent (R. 24).[5] The Master found that petitioner deliberately pursued this course of action for the purpose of placing Green Valley's funds and assets beyond the reach of the Market Administrator and thereby hindering and delaying him (R. 28). The Master also found that the amount due the Administrator by Green Valley for the period from August 1, 1937, to March 30, 1940, was $41,722.37 (18–31).[6]

On January 27, 1941, the District Court confirmed the Master's report and entered an order

---

amount paid producers, the operating expenses, and the amounts due the Market Administrator, getting a total of $199,324.79. From this he deducted the amount received from Stuart for the milk, $152,252.14, leaving a loss of $47,072.65.

[5] In June 1939, shortly after this Court's decision in the *Hood* case, *supra* (R. 25) * * * "the board of directors of Stuart Milk Company voted to pay to said Howard B. Parker a bonus of $10,000, payable at the rate of $100 per month, and to secure said bonus authorized and directed the execution of a mortgage to said Howard B. Parker upon the real estate and personal property of the corporation, exclusive of accounts receivable. Whether said bonus was paid in whole or in part did not appear in evidence."

[6] This figure is obtained by totalling the amounts due for producer settlement account ($39,595.92), marketing services ($806.13), and administration expense ($1,320.32) (R. 19–21).

adjudging petitioner, Green Valley, and Otis H. Parker in contempt, and directing that petitioner be committed to jail until compliance by Green Valley with the Marketing Agreement Act of 1937 and the mandatory injunction (R. 3695, 48–49).

Petitioner appealed to the Circuit Court of Appeals. *Parker* v. *United States,* 126 F. 2d 370. That court held that since both the interlocutory and permanent injunctions directed Green Valley to make the payments to the Administrator and that corporation was now bankrupt and unable to pay, petitioner could not be committed to jail until compliance by Green Valley with the Marketing Agreement Act of 1937 and the mandatory injunction. However, it held that since petitioner had deliberately rendered Green Valley incapable of complying with both the temporary and the final decrees, a compensatory fine should be imposed upon him measured by the amount by which petitioner had made it impossible for Green Valley to pay the Administrator as directed by both decrees.

It then established the guides to be followed by the District Court in assessing the compensatory fine. It referred to the finding of the Master that the total amount due the Market Administrator for the period from August 1, 1937, to March 30, 1940, was $41,722.37, and to the finding that Green Valley sold milk to Stuart from Au-

gust 1, 1937, to December 31, 1939, at $47,072.65 less than its actual cost, including in the cost the amount owed the Market Administrator. It pointed out, however, that the latter sum included losses incurred by Green Valley prior to November 30, 1937, the date of the interlocutory decree, for which petitioner could not be held in contempt. It concluded that (126 F. 2d, at 380):

> In determining the extent of the compensatory fine to be imposed upon Parker, the district court should consider only losses resulting from prices established by Parker after the rendition of the interlocutory decree. On the other hand, the court will be entitled to take into account the further losses resulting from Parker's pricing policy for the period from January 1, 1940, to March 30, 1940, as to which no figures appear in the record before us. Since the fine is compensatory it should as a maximum be no larger than the aggregate amount due the market administrator from Green Valley, with interest.

Accordingly, the case was remanded to the District Court with directions to amend its order so as to impose upon petitioner a fine "the amount of which will be determined by the court, with due regard to the guides laid down in this opinion" (126 F. 2d, at 381).

On March 23, 1942, the United States filed in the District Court a motion for an order in accordance with the mandate (R. 247–249), and on June

16, 1942, the District Court entered its order imposing a fine of $42,236.74 upon petitioner (R. 251). It is apparent from the motion and order that the District Court followed the mandate of the Circuit Court of Appeals in fixing the fine. It started with the figure of $47,072.65, the amount which the Master had found represented the loss to Green Valley for the period from August 1, 1937, to December 31, 1939, resulting from sales below cost. As directed by the appellate court, it deducted the loss occurring during the period from August 1, 1937, to November 30, 1937, amounting to $4,100.96.[7] It also deducted a credit of $734.95 which had been allowed by the Market Administrator after the Master had reported. The Government did not present evidence concerning the loss during the period of January 1, 1940, to March 30, 1940, which the Circuit Court of Appeals said could be included, and it was considered waived. The total loss therefore was $42,236.74. The total amount due the Administrator, with interest added to date, was $48,903.41. Since the amount of the loss was less than the sum due the Administrator, the fine was fixed at the former figure. (R. 247–251, 267; R. 3695, 41.)

Petitioner again appealed to the Circuit Court of Appeals. That court held that (R. 261) "The

[7] This figure is obtained by adding the first four sums in the right hand column on R. 3695, 41, which represent excess of cost over sales for each of the four months during this period.

only point raised is that the district court did not follow the directions in our mandate in fixing the amount of the fine." And it concluded that (R. 267) "The district court, in determining the amount of the compensatory fine, followed the directions in our mandate."

Petitioner argued in the Circuit Court of Appeals that the proper measure of the fine should have been the difference between the fair market value of the milk and the price at which Green Valley sold it to Stuart,[8] rather than the difference between the cost of the milk to Green Valley, including the amount due the Market Administrator, and the price received for it (R. 267–268). This contention was rejected on the ground that, although such a test might be proper in the case of a corporation operated in a *bona fide* manner, it was not valid where the business of the corporation had been conducted in such a way as deliberately to hinder the Market Administrator and to render the corporation incapable of complying with the court decrees (R. 269). The court

[8] The Master had found that during the period from August 1, 1937, to December 31, 1939, Stuart had purchased Class I milk from Green Valley at $26,973.30 less than it could have bought from other handlers, and he took the price at which Stuart might have purchased from others as determinative of the fair market value (R. 28, 31). If this figure were used, it would, of course, make the fine considerably lower. The figure given does not include the relatively small quantity of Class II milk sold by Green Valley (R. 32).

added that (R. 268): "In our opinion on the previous appeal we did not mention this finding of the master as to market value because we regarded it as not material to our disposition of the case."

In his petition for a writ of certiorari, petitioner raises only the question whether the fine was correctly measured.

ARGUMENT

We think it is clear that the Circuit Court of Appeals properly measured the fine. Petitioner deliberately pursued a course of conduct intended to prevent Green Valley from complying with the court decrees (R. 28, 27, 23). He persistently sold to Stuart at prices which included the other costs but completely disregarded the sums due the Administrator. By having Green Valley pay all other bills, he made it impossible for the Administrator to recover from the corporation (R. 22, 24, 28). Under these circumstances, it would have been proper to require him to pay as a compensatory fine the total amount owed the Administrator, $48,903.41. The court, however, measured the fine by the difference between the price received from Stuart and the cost to Green Valley, including in the cost the amount due the Administrator. This, it held, was the amount by which petitioner disabled the corporation from complying with the decrees. The fine of $42,236.74

thus imposed was, we think, more favorable than petitioner deserved.

Petitioner contends that the proper measure of the fine is the difference between the fair market value of the milk and the amount actually received, on the ground that Green Valley could not have received more than the market value. In this case, however, there is no reason to speculate concerning the price which the corporation could have received or the extent to which it could have complied with the decrees had it been permitted to try. Petitioner operated the corporation for the deliberate purpose of preventing collection of the sums due. He eliminated Stuart's responsibility to the Administrator by using Green Valley to buy milk from producers. Green Valley was kept bankrupt so that it could not pay the Administrator the sums required both by statute and by specific decrees of the District Court. If Green Valley was unable to operate legitimately and to comply with the decrees, it should have ceased doing business; indeed, the only reason for its continuance in business was to avoid compliance.

Moreover, even if it be assumed that payment by Stuart to Green Valley of the fair market value would not have covered all of Green Valley's costs, it does not follow that all, or indeed any, of Green Valley's book loss would have been passed on to the Administrator. An operator

who was not trying to defraud the Administrator might have arranged his affairs so that the Administrator was not the last creditor to be paid. Petitioner's argument that any deficit should be ascribed to the payments due to the Administrator assumes no change in petitioner's past practice in this respect. And it is not inconceivable that if the business had been operated in good faith, without the corporate manipulations actually availed of, the loss might have been eliminated.

The court below did not, as petitioner contends, apply punitive tests in considering the purpose and intent of petitioner. The basis of the compensatory fine was that petitioner had deliberately disabled Green Valley from complying with the decrees. The court thought, and properly so, that if petitioner had conducted the business of Green Valley in a *bona fide* manner, different considerations might apply. But since petitioner intentionally prevented compliance, the court was of the opinion that his responsibility should be measured by the amount by which he disabled the corporation from obeying the decrees. In determining his responsibility on this basis, it was necessary to refer to his purpose and intent. In so doing the court was not assessing a punitive fine but was merely determining the proper amount of the compensatory fine.

The decision in this case is not in conflict with *National Labor Relations Board* v. *Whittier Mills*

Co., 123 F. 2d 725 (C. C. A. 5), as petitioner contends. There it was held simply that in a civil contempt case it is not necessary to show intent to violate the decree. In the instant case there is no dispute on the question whether petitioner intended to violate the decree. The only question is the measure of the fine. There is nothing in the *Whittier* case to indicate that intention should not be considered in determining the measure of a compensatory fine where a corporate official is held responsible for disabling the corporation from complying with a decree.

The decision of the court below is not in conflict with other decisions of this Court or of other Circuit Courts of Appeals, and the issue as to the proper measure of the fine presents no question of public importance and no doubtful question of law. The case does not involve any general question as to the measure of a compensatory fine in ordinary civil contempt cases, but merely whether, on its particular facts, the fine assessed was correct.

CONCLUSION

Petitioner has raised no question which warrants review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
KENNETH L. KIMBLE,
JOHN S. L. YOST,
WILLIAM R. WATKINS,
Special Assistants to the Attorney General.

JULY 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943